



Northwest Indian Fisheries Commission

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April 17, 2012

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Docket No.: COE-2010-0007

RE: Revised Process for Requesting a Variance from Vegetation Standards for Levees and Floodwalls

Dear Ms. Conforti,

Thank you for this opportunity to comment on the Corps of Engineers' draft Policy Guidance Letter (PGL) governing its process for requesting variances from the Corps' national vegetation standards for levees and floodwalls.

The Northwest Indian Fisheries Commission is composed of representatives of the twenty western Washington treaty tribes. These federally-recognized tribes possess rights reserved by treaty to take fish (and shellfish) destined to pass their usual and accustomed fishing areas. Among these fish are the anadromous species originating in the rivers and streams tributary to Puget Sound and the Washington coast, including Grays Harbor, northward. Many of these watersheds contain levees that are part of and/or receive funds from the Corps' PL 84-99 program. Many of these levees are near to or abut up to rivers and streams that contain salmon and steelhead that are either subject to the tribes' treaty-reserved rights to take fish and/or are listed as threatened species pursuant to the federal Endangered Species Act.

Overview of Corps of Engineers' Levee Rehabilitation and Inspection Program

The Corps of Engineers implements its national levee Rehabilitation and Inspection Program (RIP) under the authority granted in Public Law 84-99. Under the program, the Corps makes available federal funding for the repair and reconstruction of federal and non-federal levees that are damaged by flood events or other emergencies. To be eligible for this funding, local jurisdictions/levee sponsors are required to meet minimum structural and maintenance standards established by the Corps. *See e.g.*, 33 U.S.C. § 701n; 33 C.F.R. §§203.12, 203.41. For non-federal levees, those maintenance standards are contained in a national levee maintenance manual. 33 C.F.R. §203.51. The requirements for federal levees are generally set forth in a levee-specific operations and maintenance manual provided to the local sponsor of the levee. *Id.*

The Corps conducts annual inspections of participating levees and informs levee sponsors if their levees are eligible or ineligible for RIP funding. If a levee is deemed ineligible, the sponsor is given a limited period in which to solve whatever problem prevented it from being eligible. Ineligible levees cannot receive RIP funding for repair or rehabilitation if they are damaged in a flood event. Additionally, where levees are ineligible under the RIP, the Corps will not authorize emergency funds to be expended for flood emergency preparation, flood fighting, or rescue operations. Participation in this program by local jurisdictions/sponsors is thus technically voluntary. But, as a practical matter, because of the considerable federal funding made available for eligible levees, and because of the consequences for noncompliance with RIP standards, there are strong financial and regulatory incentives to participate in the program.

The Corps' current national levee vegetation policy mandates that any vegetation over two inches in diameter on a levee must be removed.¹ This is inconsistent with the survival needs of salmon which require riparian vegetation adequate to provide, among other things, shade, soil stability, submerged and overhanging large wood, bank cover, insect drop and litter fall. *See* Letter from William Stelle, Jr., Regional Administrator, NMFS, to Major General William Grisoli, Corps of Engineers (August 18, 2011) at 2.

As mentioned above, the RIP also funds the repair or replacement of eligible levees that are damaged during flood events. Unfortunately, Corps regulations do not currently appear to allow improvements or amendments to levees (such as levee setbacks) which would improve both environmental and safety performance of levees. Instead, the Corps interprets its authorities to allow only repair or replacement of levees in the same configuration as they existed prior to the flood damage, without taking opportunities to consider setbacks, soft armoring, or mitigation that would make levees less harmful.

Congress recognizes that the Corps' levee vegetation policy needs to be adjusted to address treaty obligations.

Section 202(g) of the Water Resources Development Act of 1996 directed the Corps of Engineers to undertake a "comprehensive review" of its levee vegetation management policies. This review shall "examine current policies in view of the varied interests in providing flood control, preserving, protecting, and enhancing natural resources, protecting the rights of Native Americans pursuant to treaty and statute, and such other factors as the Secretary considers appropriate." Congress' plain language indicates the following three points: (1) Congress explicitly intended that the Corps' policy would protect Indian treaty rights; (2) Congress did not erect a hierarchy of uses; and (3) Congress charged the Corps -- not local levee sponsors -- with crafting a solution that protects Indian treaty rights, provides flood control, and is consistent with other natural resource protection laws, such as the Endangered Species Act (ESA).

¹ The current variance for the Seattle District allows for vegetation up to 4 inches in diameter, but this variance will eventually be eliminated under the Corps' new proposed PGL for levee vegetation. *See* Draft PGL, 77 Fed. Reg. at 9640 §10.

The Corps' Federal Register Notice presents a distorted picture of Congress' direction. It selectively quotes from §202(g) and completely leaves out Congress' explicit direction that the Corps develop a policy that, among other things, results in "protecting the rights of Native Americans pursuant to treaty and statute." Compare §202(g) with 77 Fed. Reg. 9637, 9638 (February 17, 2012) at §4 (Background). In addition, the Federal Register background discussion mistakenly implies that Congress mandated the Corps policy of leaving treaty rights protection obligation up to the choice of the sponsor. *Id.* Section 202(g) does no such thing. To the contrary, Congress directed that the Corps be responsible for assuring both levee structural integrity and compliance with Indian treaty rights and other applicable federal laws. The Corps' failure to recognize that its policy must assure levee structural integrity AND protect Indian treaty rights AND assure compliance with other applicable federal laws is the key flaw that prevents the draft PGL from addressing the need for levee vegetation in western Washington.

As discussed further below, the Corps' draft PGL fails to meet the clear direction from Congress. It fails because the Corps does not identify a policy that assures protection of treaty rights. Instead, the Corps' policy shunts that responsibility to local levee sponsors and lets the local levees sponsors choose whether or not to incorporate measures to protect treaty rights. Whether or not a local levee sponsor decides to protect treaty rights, the Corps will continue providing funding to the sponsor, so long as the Corps' policies for levee flood safety are met. The draft PGL also creates a hierarchy of uses not contemplated by §202(g) of the 1996 WRDA. It does this by making levee flood protection integrity mandatory, but leaving treaty rights protection and compliance with other federal laws (such as the Endangered Species Act and Clean Water Act) up to the option of the levee sponsor.

The Corps draft PGL on levee vegetation incentivizes federal and non-federal levee owners to remove levee vegetation, to the detriment of treaty-protected (and ESA-listed) salmon.

The Corps concedes that the levees in its RIP need to comply with applicable federal laws protecting salmon, such as the western Washington treaty tribes' treaty right to take salmon and the Endangered Species Act. This is appropriate because the Corps is bound to exercise its authorities in a manner consistent with the tribes' treaty rights to take fish and shellfish. *C.f.*, *Northwest Sea Farms v. Corps of Engineers*, 931 F. Supp. 1515, 1520 (W.D. Wash. 1996) (Corps has a fiduciary obligation to uphold the treaty right to take fish at all usual and accustomed places).² In the context of managing vegetation on levees sited near or on top of river banks in western Washington, the Corps recognizes that protecting Indian treaty rights and/or protecting ESA-listed salmon species may require maximizing shrubs and woody vegetation, consistent with assuring the structural integrity of the levee.³ See e.g., Draft PGL, 77 Fed. Reg. 9637, 9638 (February 17, 2012) at §6(a)(2)-(3).

² See also, *Kittitas Reclamation District v. Sunnyside Valley Irrigation District*, 763 F.2d 1032, cert. denied, 474 U.S. 1032 (1985) (Obligation of Bureau of Reclamation to provide instream flows); *Muckleshoot Tribe v. Hall*, 698 F.Supp. 1516 (1988) (Obligation of Corps of Engineers to protect usual and accustomed fishing grounds of tribes).

³ NMFS certainly recognizes the need for levees to provide vegetation. A component of NMFS' reasonable and prudent alternative for FEMA's National Flood Insurance Program specifically calls for levee vegetation to provide

Despite its recognition of these federal obligations, the Corps' draft PGL makes clear that, consistent with the Corps' interpretation of its PL 84-99 responsibilities, levee sponsors are free to keep their levees devoid of all trees and shrubs – regardless of whether Indian treaty rights or listed species may be affected. It does this by requiring compliance with the national levee vegetation management policy unless the levee sponsor requests a variance to comply with Indian treaty rights or other federal law. *See* Draft PGL, 77 Fed. Reg. at 9638 at §6(a)(1)-(3). In short, levee sponsors need only protect Indian treaty rights (or endangered species) if they feel like it. The Corps will keep providing PL 84-99 funds to levee sponsors even if they choose not to provide vegetation needed to help meet these federal laws. Even where a Corps of Engineers District decides to submit a variance request for a federal levee, it must have concurrence from the levee sponsor. *Id.* at §6(c). In other words, the draft PGL gives a levee sponsor the option of vetoing the vegetation needed to protect Indian treaty rights or listed species under the ESA even when the local Corps of Engineers District wants to do its best to meet its obligations under federal law.

The Corps does not simply leave the decision to the whim of levee sponsors. Instead, the draft PGL further weights the decision against providing necessary vegetation by requiring that the levee sponsor show that a variance from the Corps' policy is “the only reasonable means” to protect Indian treaty rights or to comply with other applicable federal law. *Id.* (emphasis added).⁴ In addition, the draft PGL creates a needlessly complex bureaucratic gauntlet requiring multiple levels of approval (at least six signatures). *Id.* at 9638-39, §7(a)-(g); *see also Id.* at 9641 (review and approval signature sheet requiring at least six signatures). Levee sponsors seeking variances are also required to provide extensive engineering and environmental analyses. *Id.* at 9643-45 (long list of submittal requirements). In sum, the draft PGL places significant technical, analytical, and financial burdens on levee sponsors who want to both retain PL 84-99 federal funding and protect treaty rights. In contrast, levee sponsors who do not care to protect treaty rights can keep their levees vegetation-free, continue to receive PL 84-99 funding, avoid conducting any engineering or environmental analyses, and do so without having to get any of the six approvals that would be required of a sponsor who wants to protect treaty rights. About the only way to create a system more hostile to treaty rights protection would be to prohibit shrubs and trees on levees without exception.

The Commission supports having structurally sound levees that are located and managed in a manner that minimizes their impacts on salmon habitat. At the April 4, 2012 levee vegetation workshop in Tacoma, Washington, a high-ranking officer in the Corps of Engineers discussed the intent of the policy as being an “iron triangle” of the following three points: safe levees, protected salmon habitat, and cost-effective measures. As components of the “iron triangle,” safe levees, protected habitat, and cost-effective measures are all necessary. This statement

temperature maintenance, bank stability, food and cover for rearing and migrating juvenile salmon. NMFS also calls for FEMA to certify levees that do not comply with PL 84-99 vegetation limits so as to counter the current incentives to “denude levees.” *See* NMFS, ESA Section 7 Consultation Final Biological Opinion: Implementation of the National Flood Insurance Program in the State of Washington, Phase One Document – Puget Sound Region, NMFS Tracking No. 2006-00472) (September 22, 2008) at 161. *See also* Letter from William W. Stelle, Regional Director, NMFS, to Major General William T. Grisoli, Corps of Engineers (August 18, 2011) at 3.

⁴ The draft PGL doesn't provide any guidance as to what the alternatives to riparian vegetation might be.

much more accurately reflects sound policy and Congress' intent in §202(g) than does the Draft PGL. The Corps needs to exercise its authorities so that it encourages these outcomes. Levees that are set back provide both greater flood risk reduction and fewer impacts on salmon habitat. Levees that can't be relocated in the near-term need to have as much vegetation (both shrubs and wood) as possible, consistent with assuring levee integrity. The Corps needs to adopt a policy that assures compliance with all applicable federal laws. Accordingly, the process for getting a variance for the purpose of protecting salmon cannot be more onerous than the process necessary to remove levee vegetation. Rather than requiring levee sponsors to ask for permission to provide some of the vegetation that salmon need, the Corps should be calling for levee vegetation and requiring levee sponsors who cannot do so immediately to identify plans for bringing their levees into compliance. Compliance approaches would include levee planting, modification, and/or setback – as necessary to assure both levee structural integrity and provision of adequate salmon habitat. Neither levee integrity nor treaty rights are optional.

The Corps' own research indicates that the effects of vegetation on levee integrity are mixed. In some cases, it's beneficial; in others, it isn't. Such equivocal results do not lead to the conclusion that vegetation must be discouraged, as the draft PGL does. The Corps needs to rewrite its draft PGL so that it levee sponsors are required to manage their levees in a manner that promotes both levee integrity and compliance with other federal laws, such as treaty rights.

The Corps' NEPA Analysis is Inadequate

The Draft Environmental Assessment (EA) and Finding of No Significant Impact (FONSI) prepared by the Corps are conclusory and fail to include a reasonable range of alternatives. Only two alternatives are considered: the no action alternative and the proposed action. There is no analysis of the different environmental effects of the two alternatives.

Like the Federal Register Notice, the EA and FONSI fail to accurately disclose Congress' direction in §202(g) of the 1996 WRDA. Neither the Purpose and Need nor the Background sections of the EA and FONSI even mention the need to protect treaty rights and comply with other federal laws for the protection of the environment, including the ESA and Clean Water Act. It would help greatly if, instead of selectively quoting from §202(g), the Corps quoted the section in its entirety and then explained how the letter and spirit of Congress' directive are addressed by the proposed action.

The Affected Environment section of the EA and FONSI does not discuss the affected environment. Moreover, it reflects a misunderstanding of the effects of the proposed action. Contrary to the statement in the draft EA and FONSI, changing the variance process does affect ESA-listed species. The draft PGL sets in motion a process that will eventually result in termination of the Seattle District's district-wide levee vegetation variance. *See e.g.*, 77 Fed. Reg. at 9640, §10. As discussed earlier in these comments, the existing Seattle District variance allows for more levee vegetation than what is allowed by the Corps' national levee policy reflected in Engineer Technical Letter (ETL) 1110-2-571. Terminating the Seattle variance will result in a reduction of levee vegetation in western Washington that is a vital component of salmon habitat. Western Washington salmon are subject to treaty-reserved rights by the Commission's member tribes. In addition, a number of these western Washington salmon

populations are ESA-listed.⁵ Since the Corps allows levee sponsors to choose whether to seek a variance or to default to the national levee vegetation standard, at a minimum, the Corps needs to analyze the impacts that would result from all levee sponsors deciding to adopt the national policy. As discussed earlier, given the onerous, expensive, and excessively bureaucratic process for getting a variance mandated by the draft PGL, it is only reasonable to assume that most, if not all, levee sponsors will adopt the course of least resistance and remove all vegetation as called for by the Corps' national policy. Thus the Corps' adoption of the proposed PGL will result in significant environmental impacts.

In its comments on the previous draft of the PGL, NMFS noted that it did not agree that implementation of the proposed action would result in insignificant impacts:

NMFS does not agree with the COE finding of no significant impact based on an environmental assessment and recommends that the COE prepare an EIS. Federal agencies typically prepare an EIS when an action has the potential to significantly affect the quality of the human environment. Significance in NEPA is determined from the context and intensity of the effects of the proposed action. The intensity of effects is determined from, among other things, unique characteristics of affected areas, degree of controversy, unique or unknown risks, precedent-setting effects, and effects on species with special status, including those listed as threatened or endangered under the ESA (40 CFR 1508.27). NMFS believes that each of these criteria is met under the current proposal. The environmental effects of the proposal are regionally controversial, bear directly on listed species and their habitat, establish new procedural precedents, and involve a degree of uncertainty with respect to risk.⁶

Like the preceding draft PGL reviewed by NMFS, the current draft PGL still strongly incentivizes levee sponsors to remove vegetation, as necessary to come into compliance with the national standard. This will result in the same adverse impacts that concerned NMFS when it supplied the comments quoted above.

The Corps' draft PGL and draft EA and FONSI fail to clearly identify the standards with which the Corps will approve any variance requests. As a consequence, even if shunting compliance efforts to local levee sponsors was legitimate, it is not possible to see whether the Corps has complied with Congress' direction to assure levee flood safety, protect Indian treaty rights, and comply with applicable federal laws, such as the ESA and CWA.

The Environmental Consequences section of the draft EA and FONSI provide no assessment regarding the effects on treaty rights. There is no analysis of the effects of the Corps' chosen variance process on listed species or efforts to comply with the Clean Water Act.⁷ The Corps has failed to meet its NEPA obligations.

⁵ There is no analysis of the Corps' decision to disallow district-wide variances, such as that which currently operates in the Seattle District, and replacing it with a piecemeal and voluntary variance process that fails to require compliance with treaty rights and federal laws protecting the environment.

⁶ See Letter to Douglas Wade, Corps of Engineers, from James Lecky, Office of Protected Resources, NOAA Fisheries (April 22, 2010) at 3.

⁷ For example, it is likely that implementation of the Corps' new levee vegetation variance process will inhibit, if not preclude, achievement of the temperature TMDL (total maximum daily load) for the Green River. This will likely

Again, we appreciate this opportunity to provide comments on the draft PGL. We look forward to working with you to develop a process which better protects treaty rights.

Sincerely,

Mike Grayum
Executive Director

result in increased incidence of lethal stream temperatures thereby impairing, if not precluding, salmon rebuilding efforts in the Green River basin.